

**Introduction of Philip Lowe  
and Announcement  
of Joint FTC/DOJ Project to Modernize  
the Horizontal Merger Guidelines**

**Remarks of FTC Chairman Jon Leibowitz  
as prepared for delivery at the  
Third Annual Georgetown Law  
Global Antitrust Enforcement Symposium  
(September 22, 2009)**

I am very pleased to have the opportunity today to introduce Philip Lowe, the beloved Director General of the European Commission's Competition Directorate, who has been a prominent member of the competition family for much of the past two decades.

I also want to speak briefly about the joint announcement we are making today with the Department of Justice about our plans to update one of the most cited documents of modern antitrust, the joint 1992 *Horizontal Merger Guidelines*.

But first let me talk about Philip Lowe. Now Phillip, of course, needs no introduction. He has spoken regularly and clearly as an effective advocate of competition policy in fora such as this around the world. He has backed up his words with his actions; in particular, while vigorously enforcing the EU's competition laws, he has sought common ground internationally, be it in resolving individual enforcement cases or in developing sound policies and practices.

As Philip took up his post in 2002, he faced several challenges: one was to implement the modernization of the EC's antitrust enforcement regime; another was to reform the EC's merger control regime in response to several adverse court decisions; yet another was state aids control, a responsibility that does not fall on US antitrust enforcers but has often taken far more time than its share of the EC's competition policy portfolio, especially since the financial crisis began a year ago.

Looming in the background of those challenges at that time was the upcoming enlargement of the European Union from 15 to 25 (and, subsequently, 27) member states. The Competition Directorate would have to expand, new staff from the new member states would have to be recruited and placed in appropriate positions, and relations with Member State authorities had to be deepened.

Particularly given all of these challenges, Philip's accomplishments are truly remarkable. For example, among his major achievements during his tenure as Director General, he:

- o applied an effects-based approach and injected more economic analysis in the Commission's competition enforcement policies;

- o provided more enforcement guidance, including on the application of Article 82, analysis of mergers, and standards for granting state aid during the financial crisis;
- o and proposed a more robust system of private enforcement of EC competition policy, including compensation for victims of anticompetitive practices.

As all of that was going on, DG COMP continued its enforcement activities, which included major decisions such as in the Microsoft case in March 2004 and the Intel case earlier this year. During this period and throughout Philip's tenure, DG COMP accelerated its anti-cartel enforcement and decided significant cases in industry sectors, such as telecommunications and energy, particularly dealing with dominant incumbents in markets into which the EU has been seeking to inject competition. The EC also made notable merger decisions – whether to clear (as in Sony/BMG) or prohibit (as in the Portuguese energy case) – that the courts have sustained and that serve as instructive models.

Those of us who reside on this side of the Atlantic will recall this time last year waking up on several Monday mornings to hear that Treasury Secretary Paulson had made a decision to bail out – or not bail out – major U.S.-based financial institutions. On the other side of the Atlantic, Philip Lowe was among those experiencing those sleepless nights when decisions had to be made very quickly on providing state aid to prop up financial institutions. Philip has had to manage the enormous influx of state aids measures – not just the initial injection of rescue capital, but also the subsequent and necessary restructuring plans. Almost anyone else would have been hard-pressed to make so many tough decisions under such pressure but, by all accounts, Philip handled them with the utmost calm and professionalism.

In making these decisions, Philip, along with Commissioners Mario Monti and Neelie Kroes, has preserved and elevated the European Commission's role as a pre-eminent enforcer and promoter of competition policy, especially in contrast to those who would displace competition principles during these times of economic crisis.

Philip has also been a major contributor to the development of the International Competition Network as the leading forum for pursuing world-wide convergence. He has been actively involved in the work of the ICN from its earliest days, and has provided insightful leadership both there and at the OECD. His leadership on the international antitrust landscape will be sorely missed by all of us.

Among Phillip's most important accomplishments was his work on mergers and merger remedies guidelines. Philip recognized the value of up-to-date guidance in ensuring the transparency and predictability of the Commission's merger enforcement policies. Today we are following his lead.

As you know, the US has its own guidelines, including the Horizontal Merger Guidelines that US agencies jointly issued back in 1992. The bulk of the Guidelines is well over seventeen years old – old enough to drive, almost old enough to vote, and probably old enough to drink in all 27 members of the European Union.

The 1992 Guidelines explicitly stated that they would be revised from time to time. We think the time has come to do that.

As our joint *Commentary*, which was spearheaded on the Commission side by Debbie Majoras, noted three years ago, the Guidelines clearly exaggerate the extent to which the agencies follow a single, rigid, step-by-step approach in merger analysis. In short, when we evaluate mergers, we center our inquiry on one key question: Is the merger under review likely to substantially lessen competition?

The aim of this project will be to demystify the process and provide more accurate guidance than practitioners and the courts have been getting from the guidelines to date.

Some of the areas we will be looking closely at as we think about updating the Guidelines include: the agencies' use of direct evidence of anticompetitive effects as an indication that the merger may harm consumers, whether we should clarify how the agencies use the hypothetical monopolist test to define markets, whether we should update the description of how the agencies use concentration statistics like HHIs to understand the impact of a merger on the market, and whether we should add remedies to the guidelines as the EU has done.

As many of you know, I've been a critic of the extent to which the Chicago School's optimism about efficiencies and about oligopoly conduct has affected merger reviews – as well as antitrust law more generally. But from my perspective, this effort isn't about giving precedence to one antitrust approach or another: it is really about good government, and making sure that the rules of the road are clear and easily understood, especially by those who enforce them.

You will be hearing more on this joint project from Christine Varney in a couple of hours. For now, I'd just like to make a few remarks about our process.

First, we will be as open as we can as we think about how we might update the Guidelines. We are announcing the project now but do not have a draft, let alone anything to release at this point. On the contrary, we are soliciting comments both generally and on a number of specific questions that our staffs have identified. We will also be holding a series of public workshops in several cities. I am delighted to announce that the first workshop will be at the FTC's conference center, right across the street at 601 New Jersey Avenue, on December 3<sup>rd</sup>. You are all invited.

In fact, no matter where your location, everyone is invited: we hope to webcast the event. Speakers have not been chosen but will be invited based in part on the most thoughtful and helpful comments.

Second, also in the spirit of open process, let me tell you who will be leading the joint inter-agency project of drafting proposed new Guidelines. We have a collegial and cohesive group of experienced litigators and antitrust scholars, both lawyers and economists, from our two agencies. From the FTC side we have Rich Feinstein, Director of the Bureau of Competition, Joe Farrell, Director of the Bureau of Economics, and Howard Shelanski, Deputy Director for Antitrust in the Bureau of Economics. Howard is a lawyer as well as an economist, so we double-dip on perspective through him. From the Antitrust Division we have Deputy Assistant Attorneys General Molly Boast, Carl Shapiro, and Phil Weiser.

Now I'll let Phillip take the podium. Due to the European Commission's term limits, Philip must give up his office in the near future. Thus, instead of presenting an introduction of Philip, it has been my bittersweet pleasure to give a valedictory.

The process of convergence toward good practice is a mutual one, and at the FTC we are deeply grateful for the opportunity to have worked so closely with Philip. Wherever he goes, Philip's professionalism, dedication and good cheer will put him in good stead.

Philip, thank you for all you have done in furtherance of competition policy. I am happy to turn the podium over to you.